No. 12188

In the United States
COURT OF APPEALS
for the Ninth Circuit

MARION J. MURPHY, ELIZABETH IRENE SWARTZ, MARJORIE JOSEPHINE PRESKEY and ROBERT MARION MURPHY,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANTS' OPENING BRIEF

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STATEMENT OF PLEADINGS, JURISDICTION AND FACTS

Plaintiffs, heirs at law of Huldah Murphey, brought this action under the Federal Tort Claims Act (28 U.S.C. 921 et seq. prior to its codification and re-enactment as 28 U.S.C. 1291, 1346(b), 1402 (b), 1504, 2110, 2401(b), 2402, 2411, 2412(c) and 2671-2680*) to recover the pecuniary loss suffered by them resulting from her death.

*All references are to the 1946 codification, and for convenience we shall continue to refer to the statute as the Federal Tort Claims Act.

Section 377 of the Code of Civil Procedure of the State of California (See Record, p. 3) gives a right of action to the heirs at law against the tort feasor causing the death and against the employer responsible for his conduct. The complaint (Record, p. 2) alleged negligence by Paul Brander, Sergeant, United States Army, in the operation of an Army carryall truck as having caused the death, further alleging that at the time Brander was "acting in line of duty". The answer (Record, p. 7) was a general denial with a separate defense that Brander "was not at said time acting within the scope of his office or employment but to the contrary was operating said government vehicle contrary to authorization and direction".

The matter was heard at Sacramento, California, on June 1, 1948, before Honorable Dal M. Lemmon, District Judge, sitting without a jury. On August 3, 1948 he filed a written opinion (Record, p. 8) and ordered entry of judgment for the defendant. Findings of Fact and Conclusions of Law were made and entered (Record, p. 15), and a Judgment after Trial (Record, p. 20) was entered, both on September 21, 1948. Thereafter plaintiffs moved to amend the findings and conclusions and judgment, and moved for a new trial. Following denial of these motions, plaintiffs appealed to this Court within the time allowed by law (Record, p. 21).

The opinion of the trial court is printed in 79 Fed. Supp. 925.

Jurisdiction of the District Court arises from the Federal Tort Claims Act and jurisdiction of this Court

arises under 28 U.S. Code, section 225, to review the final judgment of the District Court.

At about 10:30 P.M. on July 12, 1945, while returning from a barn where she had witnessed an Indian Shaker dance ceremony, Mrs. Huldah Murphey was walking across Jimmy Jack Bridge in Klamath, Del Norte County, California, with her daughter and son-in-law. This wooden bridge was ten feet wide and had no guard rails. She was either struck or forced from the bridge to the gully below, the fall resulting in her death a few hours later, by an Army carryall truck driven by Sgt. Paul W. Brander. There is no dispute as to the circumstances of the accident and the District Judge in his opinion described Brander's negligence as gross and having been the proximate cause of the death.

In accordance with a custom at the Army Air Corps radar warning station about three miles from Klamath where he was one of a complement of about twenty men, Brander had driven the carryall into the town, with three or four soldiers as passengers, for an evening of recreation. A camp vehicle had been used for the same purpose every evening for more than four months prior to the date of July 12, 1945. Brander parked the carryall, walked about, had a drink at the "White Spot", and met one Sgt. Warneck who suggested attending the Shaker dance ceremony. On their way they picked up two young ladies who were walking to the barn. It was while crossing the bridge en route to the barn that the fatal accident occurred.

All of the evidence with respect to Brander's authority to operate the carryall came to the trial court through two depositions taken by and on behalf of the appellee and read into the record at the trial by counsel for appellants. The first is that of Lt. Richard Francis Simon, former commanding officer of the radar camp, taken in Toledo, Ohio on March 16, 1948, and printed in the Record at pages 23 to 39. The second is that of Sgt. Brander, taken in New York City on April 5, 1948, and printed in the Record at pages 40 to 77. Both men were then in civilian life. From the evidence thus submitted the trial court found that at the time of the accident Brander was without authority to use the carryall and was using it for his own personal use and business. It appears that the trial court adopted the deposition of Lt. Simon in toto in reaching his decision, and utterly rejected the deposition of Sgt. Brander. Appellants contend that the better, clearer and more complete evidence is in the deposition of Sgt. Brander.

QUESTION PRESENTED

The principal question presented herein is whether the District Judge erred in finding, from testimony submitted wholly by deposition, that the driver of the vehicle which killed Mrs. Huldah Murphey was not at the time of the accident acting in line of duty and was not acting within the scope of his office or employment.

SPECIFICATION OF ERRORS

The District Court erred:

1. In failing to find as a fact that Jimmy Jack Bridge and the barn which was Brander's destination were both within the town of Klamath.

2. In finding that the carryall was used under the direction and authority of the commanding officer of the radar station solely for the purpose of transporting the men when off duty to and from the town of Klamath.

3. In finding that the driver of the vehicle was directed to park the vehicle by the side of a building where it was required to remain until used to reconvey the men to the radar station.

4. In finding that special permission was required to go to any place other than Klamath in the vehicle, thereby inferentially finding that the destination of Brander on the trip involved was outside the town of Klamath.

5. In failing to find as a fact that the men at the radar station had general permission to use the carryall for general recreational and pleasure purposes in the vicinity of the town of Klamath when off duty in the evening.

6. In finding that Brander was not acting in line of duty and was not acting within the scope of his office or employment with the United States at the time of the accident.

7. In not finding a verdict in favor of plaintiffs-appellants.

NOTE: Proposed Findings of Fact and Conclusions of Law submitted by counsel for appellee were approved as to form by counsel for appellants. No notice was given to appellants that the findings and conclusions were substantially revised prior to being signed by the Trial Judge. As printed in the Record (pp. 16 to 19, inc.) there are only seven findings of fact whereas appellants, referring to the abandoned proposed findings in their statement of points upon which they intend to rely on appeal (Record, page 80) refer to numbers through fourteen. All reference herein will be to the findings as printed in the Record. Appellants approve findings 1, 2, 5 and 6 in full and challenge findings 3, 4 and 7 in whole or in part.

ARGUMENT

Part I

THE COURT OF APPEALS SHOULD REVIEW INDEPENDENTLY THE EVIDENCE SUBMITTED BY DEPOSITION TO THE TRIAL COURT AND UPON WHICH THE DECISION OF THE TRIAL COURT IS WHOLLY FOUNDED.

Appellants contend that when the sole evidence on a particular issue is presented to the trial court through depositions the appellate court is in as good position as the trial court was to appraise the evidence and has the burden of doing so. In such instance the findings of the trial court are entitled to slight weight and the appellate court should reach its conclusion independently from the trial court.

Equitable Life Assur. Soc. v. Irelan (1941) C.C.A. 9, 123 F. (2d) 462, 464.

Smith v. Royal Ins. Co. (1942) C.C.A. 9, 125 F. (2d) 222, 224, cert. den. 316 U.S. 695. 62 S. Ct. 1291, 86 L. Ed. 1765.

Stork Restaurant, Inc. v. Sahati, et al., (1948) C.C.A. 9, 166 F. (2d) 348.

In *Hummell Bros. Co. v. Serrick Corporation,* C.C.A. 7, 122 F. (2d) 740, the court at page 742 says of Rule 52A of the Federal Rules of Civil Procedure regarding the weight to be given to the findings of the lower court:

> "We are of the opinion that it carries little, if any weight in the instant matter for the reasons (1) the findings relied upon appear to be conclusions of law rather than findings of fact, and (2) substantially all of the testimony in the case was taken by deposition and under those circumstances the court below was in no better position to judge of the credibility and the weight to be given to the witnesses than this court."

Appellants will discuss the errors in the findings in the order in which they appear. As to *finding No. 3:*

A review of the testimony concerning the location of the bridge and of the barn in which the Indian Shaker dance ceremony was being held—Brander's destination—discloses that finding No. 3 is in error in placing the bridge "in or near Klamath", thereby implying a substantial trip in the carryall before the accident. Simon placed the barn as two to three to five blocks from Klamath (Record, p. 30). Brander placed the barn as three city blocks from the center of the town—about 600 to 645 feet (Record, pp. 73 and 74), as part of the town (Record, p. 74), as in the town of Klamath (Record, p. 77), and as fifty yards beyond the end of the bridge (Record, pp. 44 and 48). It therefore seems clear that the bridge and barn were within the town and only a short distance from its center.

As to *finding No. 4:*

In the last paragraph of finding No. 4 (Record, p. 17) it is stated that Brander " * * * was not acting in the line of duty and was not acting within the scope of his office or employment with the United States of America". Appellants contend that this is a conclusion of law not warranted by the testimony in the depositions and will discuss it in the light of the statements appearing in finding No. 7 (Record, pp. 18 and 19).

As to *finding No. 7:*

This is the catch-all finding which appellants contend is simply a paraphrase of the deposition of Lt. Simon and is as much in the nature of a conclusion of law as it is a finding of fact. Appellants challenge the finding generally as not being based upon the better and clearer evidence in the case.

The use of the carryall for pleasure was a permitted and contemplated use of the vehicle (Simon, Record, pp. 25 and 26), (Brander, Record, pp. 41, 42, 43, 51, 52, 61, 63, 66, 75 and 76). Brander had a permit to drive the carryall for pleasure purposes (Simon, Record, p. 25). In his opinion the trial judge commented that "The amusement of the men may be a part of defendant's business" and cited *Jacobus v. Brero,* 190 Cal. 375, in support of that statement (Record, p. 12). See also *Ackerson v. Erwin M. Jennings Co., Inc.,* 107 Conn. 393, 140 A. 760; *Conklin v. Kansas City Public Service Co.,* 41 S.W. (2d) 608.

The general question here raised is the relation of the armed forces' health and recreation program to the liability of the United States under the Federal Tort

Claims Act. Specifically the issue is whether the courts should declare the term in the Act "in line of duty" to be meaningless in reference to such program or whether it should encompass the broad program of off-duty activities of the armed services which has been found desirable to maintain our military and naval personnel at the highest peak of health, morale and efficiency.

The court should take judicial notice of the complete change of attitude toward military personnel which came about as we prepared for World War II. Our new servicemen were civilians, not career men in the military. Prior to their time there was little programming which did not relate specifically to the exact duties of the soldier, because the peace-time soldier for the most part led the life of a civilian. He had been regarded as a man with a job to whom there was little or no official responsibility when he was off duty. But with the advent of the new army came a new relationship to the government. The serviceman in war time, when this accident occurred, was away from his home surroundings, wearing a uniform which set him apart at all times, and the new government policy toward him became like a tent which covered him every moment. This was merely recognition of the fact that he was, by virtue of his enrollment, subject to military orders and discipline twenty-four hours per day. The military assumed control of him and his conduct, a situation directly shown in the instant case where despite clear evidence of gross negligence resulting in the death of a civilian, no action was taken by civilian authorities. Extensive schooling and training programs were established for the benefit

of the servicemen in fields apart from their military duties. But the greatest change came in the field of recreation.

The posters soliciting enlistments depicted the recreational and educational opportunities which flowed from military service. Swimming, dancing, ping-pong, baseball, football and sight-seeing were made inducements to enter the services, and indeed pursuance of them became a part of the program of the armed services for morale-building purposes. Such a program obviously contemplated the use of transportation facilities by the men in their off-duty hours and from that fact arose the custom of the men at the radar station at Klamath to use the carryall for general recreational purposes. It should be noted that the commanding officer at the station claimed power or authority in himself to permit the use of the carryall for pleasure or recreational purposes. The issue in the instant case is not, as the findings, opinion and judgment of the trial judge would indicate, whether Sgt. Brander had authority to operate the carryall for recreational and pleasure purposes, but rather whether at the time of the accident which caused the death of Mrs. Huldah Murphey he had so far departed from the generally permitted use of the vehicle as to make its use at the time an intervening cause or something done in pursuance of a private avocation or business.

In his deposition Lt. Simon affirmed the authority of Sgt. Brander to drive the carryall into Klamath for recreational purposes (Record, pp. 25 and 26). Simon's deposition is devoid of any statement as to the nature

and extent of the instructions under which Brander was to operate the vehicle. Asked what was "supposed to happen" to the truck while the men were seeking entertainment he said, "Parked alongside a building in town, and left there until it was ready to come back" (Record, p. 29). Counsel for appellants had objected to opinion and conclusion testimony from Simon, and the objections were sustained. However the trial court threatened a continuance of the trial if the objections stood, and counsel for appellants, faced with that prospect, withdrew and waived objections previously made and sustained, and made no further objections to testimony clearly inadmissible as opinion and conclusion testimony (Record, pp. 26 to 29).

The opinion and findings of the trial court reflect the flat opinion and conclusion statements of Simon, who does not say at any time what instructions were given or whether in fact any instructions were ever given. He does testify that operation was to be "under instructions of the commanding officer" (Record, p. 25). That ends his testimony as to the instructions without further definition of their nature and extent, whether oral or written, and the time they were made effective. There is no basis in the record for the question and answer on page 29 of the Record concerning use of the vehicle "for any other purpose than originally designated by—Brander's—authority". On page 30 of the Record Simon was asked whether Brander told him why he had driven to the meeting "contrary to orders". The appellate court should weigh this testimony in the light of the facts surrounding its admission into evidence.

Review of Sgt. Brander's deposition reveals direct and positive testimony to the following effect:

1. Brander had permission to operate the carryall for pleasure purposes (Record, pp. 41, 42 and 43).

2. Brander had been stationed at the radar camp for four months prior to July 12, 1945 (Record, p. 40), whereas Lt. Simon had been stationed there only one to two months prior to that date (Record, p. 24).

3. The procedure that the first competent driver to complete his duties for the day became the driver of the carryall into town for the evening was going on when Brander arrived at the camp (Record, p. 62).

4. There were no orders outstanding prior to the date of the accident regarding the use of Army vehicles during evening hours. No permission was required to take a vehicle to town in the evening (Record, p. 42).

5. Under the practice in effect with respect to use of the vehicles no special permission would have been required to drive the carryall on the trip to the barn, which was within the town of Klamath (Record, p. 77).

6. Permission to take the vehicle out of the camp in the evening included permission to go short distances outside of Klamath (Record, p. 75).

7. When camp personnel wanted to attend a function at any town other than Klamath they asked permission from the commanding officer to attend such function but did not have to ask for permission as to the motor vehicle to be used as a conveyance for the particular occasion (Record, p. 52).

8. The commanding officer of the camp knew that the vehicle was used to go on trips in the evening outside of Klamath, as to a dinner, without express permission therefor, and never forbade such a use of the vehicle after learning of such use (Record, p. 76).

9. Only if the contemplated trip in the evening involved considerable distance was it the general rule to ask for permission to use a vehicle for such a trip (Record, p. 76).

10. No dispatch or requisition forms were used or kept at the camp and no mileage accountability system was followed (Record, pp. 63 and 64).

It is submitted that on the better, clearer and more direct evidence in the deposition of Sgt. Brander, this court should reject the deposition of Lt. Simon, and find that at the time of the accident Sgt. Brander was operating the vehicle with the permission of the commanding officer of the camp at which he was assigned.

Part II

THE TRIAL COURT ERRED IN FAILING TO HOLD THAT THE DRIVER OF THE CARRYALL WAS IN LINE OF DUTY AT THE TIME OF THE ACCIDENT.

The pertinent provisions of the Federal Tort Claims Act are as follows:

> " * * * the district court * * * shall have * * * jurisdiction * * * to render judgment against the United States * * * on account of personal injury or death caused by the negligent or wrongful act or

omission of any employee of the Government while acting in the scope of his office or employment, under circumstances where the United States, if a private person, would be liable * * * in accordance with the law of the place where the act or omission occurred. 28 U.S.C. 931 (a).

"(b) 'Employee of the Government' includes officers or employees of any Federal Agency, members of the military or naval forces of the United States * * *."

"(c) 'Acting within the scope of his office or employment', in the case of a member of the military or naval forces of the United States, means acting in line of duty." 28 U.S.C. 941.

A statute must be construed so as to give meaning to every word, clause and sentence thereof.

Hellmich v. Hellman, 276 U.S. 233, 48 S. Ct. 244, 72 L. Ed. 544 (1928).
Washington Market Company v. Hoffman, 101 U.S. 112, 25 L. Ed. 782 (1879).
Ex parte Public Nat. Bank, 278 U.S. 101, 73 L. Ed. 202 (1928).

Congress recognized that the military and naval servicemen were in a different relationship to the government from ordinary employees of the other agencies by the very use of the term "in line of duty". Had it employed the term "on duty" it would have been clear that the United States intended to be liable for negligence of servicemen and women only when the acts were within the scope of their actual duties. There is a clear distinction between the two terms (see discussion, post, of opinion of the trial court). But "in line of duty" is much broader than "scope of office or employment". The latter term relates to work and duty exclusively

whereas the first includes not only the conceptions embodied in work and duty but adds to them a special circumstance of status.

It is unfortunate that principle consideration of the phrase "in line of duty" has been when the issue of the fault or negligence of a serviceman sufficed to deprive him of that status. To adopt interpretations of the phrase without careful consideration of all the facts and circumstances may be to deny the beneficial purpose of the Federal Tort Claims Act, which is to compensate third persons injured by such very negligence.

The phrase "in line of duty" is unexplained in the legislative history of the Federal Tort Claims Act.

> "Tort Action Against the Government," Walter Gellhorn and C. Newton Schenck, 47 Col. L. R. 722, 727; and "The Federal Tort Claims Act," 56 Yale Law Journal, 534, 540, n. 41.

Various interpretations have been placed upon the phrase and it appears to be one whose meaning is adapted to the changed circumstances and conditions which reqiure its application. Originally and principally it has been used to limit the conditions under which benefits were obtained as a consequence of service of the United States. As a result the usual guide to its meaning has been the opinion of the Attorney General of the United States. The following is a list of the principal opinions in which the phrase has been interpreted:

7 Op. Atty. Gen. 149 (1855)
7 Op. Atty. Gen. 161 (1855)
17 Op. Atty. Gen. 172 (1881)
32 Op. Atty. Gen. 12 (1919-21)
32 Op. Atty. Gen. 193 (1919-21)

35 Op. Atty. Gen. 506 (1925-29)
36 Op. Atty. Gen. 156 (1929-32)
36 Op. Atty. Gen. 442 (1929-32)

The issue in these opinions fell into two classes of cases, first, whether the conduct of the claimant was a cause or a condition of the injury for which compensation was asked, and second, whether the claimant was in a particular status at the time the injury was suffered. Eliminating the cases in which contributory negligence or fault of the party was the principal issue, it is submitted that the "status" cases support the contentions of the appellants. It must be obvious that to base liability of the United States under the Federal Tort Claims Act upon whether the agent of the United States was guilty of negligence is to make the Act meaningless.

In 32 Op. Atty. Gen. 193 five cases are considered. In the two instances in which the person were held not "in line of duty" the injury was held not to have any relation to the military status. Fault is considered in all five cases. But the application of a fault test to liability under the Act leads appellants to repeat that application of such a test automatically defeats the Act.

The judicial interpretations of the phrase "in line of duty" seem to be broader in general than the administrative ones. A narrow line of judicial opinion is exemplified by the case of *Rhodes v. United States,* 79 F. 740, C.C.A. 9, 1897, cited by the trial court in its opinion (Record, p. 14). The decision in the Rhodes case is based on the opinion of the Attorney General given in 1855 (7 Op. Atty. Gen. 149, 161), and requires that there be a causal relation, mediate or immediate, to the

duty required from the actor. The broader view is shown in the case of *Moore v. United States,* 48 Ct. Cl. 110, decided in 1913, in which the Rhodes case is not cited, and which declares that the serviceman is "in line of duty" until separated from the service by death or discharge, so long as he is submitting to military rules and regulations.

The Army and the Navy are concerned with the meaning of the phrase and have considered it officially many times. It seems that the Army adopts a more liberal interpretation than the Navy.

The Judge Advocate General of the Army submitted a lengthy analysis of the phrase "LINE OF DUTY" and the rule of construction applicable to it. As a preliminary he expressly disapproves the narrow construction placed on the term by the Navy. Terming the Moore case as warranting a broad interpretation he says, commenting on the difference in relation between the civilian to his employer and the soldier to his superiors,

> "The reciprocal rights and duties of the employer and employee are within narrow limits of time, place and particular circumstances. The contact between the two is intermittent. The reciprocal rights and duties of the military authority and the soldier are as broad as human relations and are limited in time, place, or particular circumstances only by the military authority itself. The relation of a soldier to the military authority is a status in the highest degree confidential, because obedience to military orders is imperative, requiring, if necessary, the supreme sacrifice. The actual time and labor consumed in combatant hostile operations by the military establishment constitute but a small

fraction of the whole. To render combat operations effective preparatory and supporting work must be intense and under strict regulations. The ability of a military unit to maintain itself is dependent upon its texture. That ability comes only by the complete dedication of the soldier to the military service; asleep, he may be wakened; on leave or furlough, he may be called to his post; living, he may be sent to certain death. His whole life, those affairs that affect his body, his mind, his morals, and his happiness are of vital concern to the military success of the Army as a whole and are wholly subject to the order of the ultimate military authority.

"Bearing in mind that the soldier is always subject to military control and at all times bound to obey military orders, that furloughs are merely rest periods and part of the training of the soldier, the application of the principles enumerated by the courts in construing the workmen's compensation act will result in the following rules:

"(a) * * *

"(b) In determining whether the acts of a soldier within the period of his service are in line of duty, rules based on exact limits of time and place are not applicable. Here lies one of the distinct differences between a soldier and an employee. The status of employee continues, under ordinary circumstances, only while the employee is on the premises and during hours when engaged specifically upon the employer's business. Outside of such time and place the status ceases. The status of the soldier, on the other hand, is continuous in time and place.

"(c) Upon such basis alone, disability or death incurred during leave or furlough is not for that reason out of the line of duty. Leaves and furloughs have been determined to be a necessary element in the training of the Army. They are vital to its morals. * * *."

Opinions of the Judge Advocate General of the Army, Vol. 2, 1918, page 1006.

The Army has determined that persons engaged in recreation are "in line of duty" and the following opinions outline the Army view:

"An officer on duty status was killed while engaged in normal and proper recreation. The Pension Bureau refused his widow a pension. Query: Did the death occur in line of duty within the administrative determination of the War Department? The Pension Bureau interprets the words "death due to military service in line of duty", as they are used in the pension law, as admitting only deaths where an act of military duty is related to the death as an effective cause. *Congress itself has interpreted the words to refer only to the status of the deceased at time of death. The War Department adopts the latter construction and has consistently construed casualties as due to military service in line of duty wherever the person suffering them was on a duty status under competent orders and engaged in occupation or recreation proper and normal to persons in that status.*

"HELD, tested by this rule, that this casualty was due to military service in line of duty. It is unfortunate that the construction of this law is not consistent in both departments, but after careful consideration, this office can concede nothing of its own view of the meaning of these words. 42-520, Mar. 24, 1917." (Emphasis supplied)

Digest of Opinions of the Judge Advocate General, 1912-1940, p. 966.

"Encouragement of athletic pursuits as a part of the training of the Army has advanced by long strides during recent years. A soldier's physical as well as moral welfare are advanced thereby. Among athletic contests there is no game more encouraged as tending toward military training and proper mili-

tary spirit and the understanding of discipline than the game of football.

"HELD, that injuries received in athletic sports properly indulged in by officers and enlisted men while in camp or garrison are incurred in line of duty.

"HELD, further, that in view of the fact that football is a contest which requires return games, a soldier's status while engaged in such return game away from the reservation is as much that of line of duty as though he were playing on the parade ground of his own post.

"HELD, therefore that if he should be disabled in a duly authorized football game away from his reservation such disability would be in line of duty. C. 24398 Feb. 13, 1909."

Digest of Opinions of the Judge Advocate General of the Army, Howland, 1912, p. 686.

One Pvt. Hughes was killed by a train as he walked across a railroad bridge "in pursuit of recreation". He was at the time absent from his post on a 10-hour pass. He was found not to have been guilty of any negligence contributing to his death and it was held that he was in line of duty at the time of his death.

Opinions of the Judge Advocate General of the Army, vol. 1, 1917, p. 216.

In the present case Sgt. Brander was in off-duty status, neither on leave nor on a furlough. The court can take judicial notice of the fact that this is known as absence on a "pass", which is simple permission to be off the post for a short period of time. The Army has declared that men in such status are "in line of duty" as a general rule.

"It is an essential incident in the operation of a 'pass' that the permission to be absent should not be for more than 24 hours, i.e., for such a length of time as to operate to remove the soldier from the possibility of being called for the performance of the more important duties for which he is expected to hold himself in constant readiness. Men on pass are thus not removed from the list of those who are 'present for duty' on the rolls.

"HELD, therefore, that to regard a man on pass as 'absent with leave' or 'on furlough' would work a serious injury in respect to the soldier who is in the immediate neighborhood of the post, and subject to call for duty if needed, and whose status therefore while on pass is, in the general case, *IN LINE OF DUTY*. C. 15600, Dec. 10, 1903; 2658, Oct. 16, 1896; 17202, Dec. 1, 1902; 23666, Sept. 21, 1909, and Sept. 8, 1910; 24393, May 7, June 1, and Oct. 3, 1910; 26949, June 23, 1910." (Emphasis supplied)

Digest of Opinions of the Judge Advocate General of the Army, Howland, 1912, p. 684.

The Navy has been relatively liberal in its interpretation of the phrase "in line of duty" as shown by the following:

"The following answer was made to a request for information concerning the Navy Department's policy with respect to line of duty status in ordinary cases of accidental drowning while on liberty, or while on leave: 'It is the view of the Navy Department that leave and liberty are given primarily for the purpose of recreation and relaxation. Any member of the naval service who meets his death while engaged in usual forms of recreation as in the case of accidental drowning while in swimming is considered to have died *IN LINE OF DUTY,* provided death did not result from his own misconduct. (C.M.O. 11, 1935, p. 10, C.M.O. 5, 1931, p. 25; C.M.O. 9, 1936, p. 19;' File: P2-5 (2)/A2-15

(370803), Oct. 28, 1937—J.A.G.)." (Emphasis supplied)

Compilation of Court Martial Orders, 1916-1937, Vol. 2, C.M.O. No. 10-1937, p. 2179.

"An enlisted man, U. S. Navy, while riding on a motorcycle with a girl, collided with an automobile near Santa Monica, Calif., at 3:30 P.M. on June 11, 1931, as a result of which he died in the Santa Monica General Hospital at 10:05 p.m. on the same date. He was on authorized leave at the time of the accident.

"No court of inquiry, board of inquest, or board of investigation was held in this case. Information received from various sources, however, indicated that at the time of the accident this man was traveling at a fast rate of speed and crashed into a Cadillac car, the driver of which was making a left hand turn when struck by the motorcycle. The road at the scene of the collision was through a canyon and in the nature of a shallow S turn. At that place the driver of the automobile could not see the road behind him for a distance of one city block as houses which lined the left of the road as well as the sides of the cut would obstruct his vision. The commanding officer of the deceased stated that since the laws of California are very specific as to making U turns on highways, and from the limited information available he was of the opinion that the man's death was *IN LINE OF DUTY* and not due to his own misconduct.

"Held, that death in this case was not due to misconduct of the deceased (File: MM-Rath, Roy/P2-5 (2) (310701), Aug. 18, 1931)." (Emphasis supplied)

Compilation of Court Martial Orders, 1916-1937, Vol. 2, p. 1640.

Cases almost similar in every point to the above in which the death or injury was held to have been re-

ceived "in line of duty" are found in Vol. 1, p. 223, C.M.O. 71-1918; Vol. 1, p. 794, C.M.O. 6-1922; and Vol. 2, p. 2096, C.M.O. 1-1937.

The Army and Navy have a definite responsibility in the administration of laws in which the phrase "in line of duty" plays an important part and this court should give careful consideration to their interpretation. It is a well settled rule of law that the construction placed upon words by those having control of their execution is entitled to considerable weight and will not be disregarded except for cogent reasons.

United States v. Jackson, 280 U.S. 183, 74 L. Ed. 361 (1930).
Brewster v. Gage, 280 U.S. 327, 74 L. Ed. 457 (1930).

It is therefore submitted that the foregoing interpretations made by the Army and the Navy should be adopted by this court.

The interpretations placed upon the phrase by state courts has usually been liberal. Thus, where an insurance policy denied benefits if death was "the result of military service", and the death occurred accidentally from a gun in the hands of a fellow soldier, and the insurance company refused to pay, pointing out that the death certificate read that death occurred "in line of duty", the court held that the phrase meant that the deceased was not violating any military law at the time.

Malone v. State Life Ins. Co., (1919) Mo., 213 S.W. 877.

Another case in which "in line of duty" was interpreted as meaning not in violation of any military

law, order or regulation is *Doke v. United Pacific Insurance Company,* 15 Wash. (2d) 536, 131 P. (2d) 436. There a member of the National Guard was killed while en route to the armory to attend a drill. It was held that he was "in line of duty" and his beneficiaries were paid.

In *Globe Indemnity Company, et al. v. Forrest,* 165 Va. 267, 182 S.E. 215 (1935), an action was brought against the compensation insurer of the state by a member of the Virginia National Guard to recover for injuries suffered while returning to camp from an evening's amusement at a beach resort. The court sustained the right to compensation, saying in its opinion:

> "The relationship of master and servant was not broken when Forrest went to Virginia Beach on pass. This pass, or temporary leave of absence from his duties at the camp, was nothing more than a permission for him to absent himself for a few hours of recreation. During this period his employment continued for the reason that he was still in the character of a soldier and never dropped this character for one minute.
>
> "The enlisted soldier, during his enlistment, and particularly during the active specific period of duty, never doffs the habiliments of his profession, to the extent of being beyond military orders and control. A pass granting temporary leave for recreational purposes cannot change this status any more than a leopard can change its spots. It would be dehors the principles of military science if it were otherwise."

To predicate a denial of recovery in the instant case upon disobedience of Brander to any supposed order of a superior officer would be to make absolute something

which is a matter of degree. The purpose of Brander's visit to Klamath was recreation and the carryall was given to him for recreational purposes. His status as "in line of duty" should be held to continue while he was engaged in recreational pursuits in accordance with the above decision.

The only instance in which "in line of duty" has been interpreted as meaning "in the prosecution of the business of the employer" is cited with approval by the trial court in its opinion (Record, p. 14). In that case, *LaBella v. Southwestern Bell Telephone Company,* 24 S.W. (2d) 1072 at 1075, the court distinguishes between acts done "within scope of employment" in contrast to acts done "in prosecuting the employers' business" or "in line of duty". Appellants submit that there is no support for this interpretation. It is submitted that the court in that case was confused between the meanings of the terms "on duty" and "in line of duty".

The trial court also cites *Collins v. Dollar S. S. Lines,* D.C.N.Y., 23 F. Supp. 395, wherein a civilian injured in a baseball game while enjoying recreation at Singapore was held not "in the service of the ship" at the time. In that case the vital elements that there was no military status and the employer offered no encouragement or support to the recreation appear. It is submitted that the case is not analogous.

Hutchins v. Covert, 39 Ind. App. 393, 78 N.E. 1061, is an instance in which a policeman who went beserk and shot several persons, thereafter committing suicide, was held not to have met his death "in line of duty". The

discussion of the basis of liability is so far apart from the present case as not to warrant further analysis. Nothing in the nature of the legislation involved in the instant case was being considered. At p. 388 of the state report the court says, "So far as we are advised, statutes of the United States granting pensions to disabled soldiers and seamen, and in the case of death, to widows, etc., are the only ones using the words, 'in the line of his duty'."

In the instant case appellants contend that recreation for the men at the radar camp was a part of the employer's business. In the Loper case is found a list of the principal California cases in which the issue of a departure from authority or permission in the use of an automobile is involved. In that case the court said,

> "In each case the scope of employment and all relevant circumstances must be considered. * * * the factors (as listed in the cases) * * * are intent of the employee, nature, time and place of his conduct, his actual and implied authority, the work he was hired to do, *the incidental acts that the employer should reasonably have expected would be done and the amount of freedom allowed the employee in performing his duties.*" (Emphasis supplied)
>
> *Loper v. Morrison,* (1944) 23 Cal. (2d) 600, 145 P. (2d) 1 at page 3.

Reviewing the testimony of Brander as to the freedom permitted the men at the camp in the use of the truck—and even considering that there may have been an order restricting the use of the truck when it was being used for recreation as Simon so weakly testified,

would it not be reasonable to expect the truck to be used within the town as Brander used it?

Two leading California cases in which an employer has been held liable for damages caused by the negligence of his employee in using his automobile—so-called "deviation" cases, are *Kruse v. White Brothers,* (1927) 81 Cal. App. 86 and *Loper v. Morrison* (supra). Although appellants feel that there is no deviation in the instant case, yet under the doctrine of the Loper case cited supra, the deviation must be held to have been reasonably anticipated when Brander was permitted to take the carryall for pleasure purposes.

Attention is called to a recent "deviation" case under the Federal Tort Claims Act where a driver who had taken a very substantial trip was held to have returned to duty although he was about four blocks from his proper location at the time of the accident.

Lowe v. United States, (1949) W.D. Mo. W.D. 83 F. Supp. 128.

SUMMARY

Appellants contend that the depositions, read together, disclose that extreme liberality was actually permitted in the use of the camp vehicles for pleasure purposes, and that there is no substantial evidence of the kind of limitations outlined in the opinion of the trial court. Both as a matter of fact and as a matter of law the evidence requires a finding that at the time of the

accident Sgt. Brander was "in line of duty" and the United States is liable to appellants.

Respectfully submitted,

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